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Liziz Plantation v Liew Ah Yong

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HIGH COURT (IPOH) — ORIGINATING SUMMONS NO AA-24NCVC-82–02 OF 2020
SU TIANG JOO JC
6 SEPTEMBER 2020

C

Civil Procedure — Transfer of proceedings — From High Court to another — Application for transfer of proceedings from High Court at Ipoh to High Court at Kota Bahru — Whether transfer of proceedings to another court would be in interest of justice — Whether defendant witnesses' location could justify transfer of proceedings — Rules of Court 2012 O 57 — Courts of Judicature Act 1964 s 23

D

The plaintiff filed the action on 21 February 2020 against the defendant for, inter alia, an order that private caveats lodged by the latter be removed pursuant to s 327 of the National Land Code ('the NLC'). The plaintiff claimed that the entry of the private caveats was wrongful and sought damages pursuant to s 329 of the NLC. The private caveats were lodged over the lands held under issued documents of title PN 10051, HS(D) 702 Mukim Relai and HS(D) 1644, HS(D) 3928, HS(D) 3927 and HS(D) 3926 Mukim Ulu Nenggiri, Jajahan Gua Musang, Kelantan ('the said lands'). The defendant took out an application vide encl 5 pursuant to O 57 of the Rules of Court 2012 ('the ROC') and s 23 of the Courts of Judicature Act 1964 and the inherent jurisdiction of the honourable court for an order that the action to be transferred to the High Court in Malaya at Kota Bahru. The defendant submitted that the proceedings in the action would have a bearing on the registered owner of the said lands namely the Perbadanan Menteri Besar of Kelantan. As the action was for the removal of private caveats over the said lands, with the Perbadanan Menteri Besar was not a party to the action, the latter would not be bound by any order made. The plaintiff opposed the transfer application. The defendant further submitted that in the event an order was granted for the private caveats to be removed, witnesses from all over including witnesses from Kota Bharu including the defendant who was now in Gua Musang would have to be called for the assessment of damages.

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Held, dismissing defendant's application of transfer in encl 5:

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(1) Based on the authority of the case of *Luggage Distributors (M) Sdn Bhd* [1995] 1 MLJ 719, the factors of where the cause of action arose and where the facts on which the proceedings were based existed or were alleged to have occurred would not be determinative of the transfer application by reason of the procedure that was to be adopted for the

purpose of the hearing. Pursuant to the procedure, the action could just as conveniently and fairly tried in the present court. With the proceedings in the action having reached an advantage stage of being ready for hearing, it would not be in the interest of justice to have the action transferred to another court as a transfer would not secure the just, expeditious and economical disposal of the action (see paras 36–37).

(2) The forms and statutory declarations filed for the entry of the private caveats showed, inter alia, that the defendant's residential and business addresses were in Ipoh, Perak. Little weight was given to the defendant's averments that he was currently residing in Terengganu. In any event, his residing in Terengganu did not aid in his transfer application for purposes of compliance with the factor in sub-para (B) of O 57 r 1(4) of the ROC. It would be absurd if any one defendant could seek a transfer of proceedings just by relocating to another local jurisdiction in the course of proceedings and inviting the court to play catch up. The factor in sub-para (B) of O 57 r 1(4) of the ROC had been complied with and the action should remain in this branch of the High Court. The defendant's averment, that in the event an order was granted for the removal of the private caveats, witnesses from Kota Bharu, including himself in Gua Musang, would have to be called for the assessment of damages, was a bare averment. There were no supporting materials to support the submission and this would not be taken into consideration. It was premature at this stage as it was yet to be determined whether the plaintiff's action would be allowed and whether there would be any assessment of damages, if at all, and if so, by whom, when and where (see paras 20, 38 & 40–42)

(3) In the circumstances of the case, and given the increasing acceptance of remote communication technology, it would not be in the interest of justice to allow the transfer application. It would not secure the expeditious and economical disposal of the action. With the experience gained in using remote communication technology in dealing with the Movement Control Orders, that was extant and necessitated by the Covid-19 pandemic, the physical location of any one litigant or witness and the issue of having to physically travel to any court have become very much less important. Hearings and meetings could now be done via a variety of internet platforms (see paras 43–44 & 49).

[Bahasa Malaysia summary

Plaintif telah memfailkan tindakan ini pada 21 Februari 2020 terhadap defendan untuk, antara yang lain, satu perintah bahawa kaveat peribadi yang difailkan oleh defendan dikeluarkan selaras dengan s 327 Kanun Tanah Negara ('KTN'). Plaintif menuntut kemasukan kaveat peribadi tersebut adalah salah dan memohon agar diberi ganti rugi selaras dengan s 329 KTN. Kaveat peribadi tersebut dimasukkan terhadap tanah yang dipegang dibawah

dokumen yang dikeluarkan dibawah dokumen hakmilik PN 10051, HS(D) 702 Mukim Relai dan HS(D) 1644, HS(D) 3928, HS(D) 3927 dan HS(D) 3926 Mukim Ulu Nenggiri, Jajahan Gua Musang, Kelantan ('tanah tersebut'). Defendan membuat satu permohonan melalui lampiran 5 selaras dengan A 57 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan s 23 Akta Mahkamah Kehakiman 1964 dan bidang kuasa sedia ada mahkamah untuk satu perintah bahawa tindakan tersebut dipindahkan ke Mahkamah Tinggi Malaya di Kota Bahru. Defendan menghujahkan bahwa prosiding dalam tindakan akan mempunyai kesan terhadap pemilik berdaftar tanah tersebut iaitu Perbadanan Menteri Besar Kelantan. Atas sebab tindakan tersebut adalah untuk pengeluaran kaveat peribadi terhadap tanah tersebut, dengan Perbadanan Menteri Besar bukan pihak di dalam tindakan, mereka tidak akan terikat dengan apa-apa keputusan. Plaintif menentang permohonan untuk memindahkan tersebut. Defendan turut menghujahkan bahawa dalam keadaan satu perintah diberikan untuk kaveat peribadi dikeluarkan, saksi daripada merata-rata, termasuk saksi dari Kota Bahru termasuklah defendan yang kini berada di Gua Musang perlu dipanggil untuk penaksiran ganti rugi.

Diputuskan, menolak permohonan defendan untuk memindahkan kes dalam lampiran 5:

(1) Berdasarkan otoriti dalam kes *Lugage Distributors (M) Sdn Bhd* [1995] 1 MLJ 719, faktor yang mana kausa tindakan timbul ada berdasarkan kewujudan atau apa yang dikatakan telah berlaku tidak akan menjadi penentu permohonan untuk memindahkan atas sebab prosedur yang akan diguna pakai untuk tujuan pendengaran. Selaras dengan prosedur tersebut, tindakan tersebut juga boleh dengan mudah dan adil dibicarakan di mahkamah kini. Dengan prosiding dalam tindakan telah sampai ke peringkat yang maju dan sedia untuk dibicarakan, ianya bukan dalam kepentingan keadilan untuk tindakan tersebut dipindahkan kes mahkamah lain kerana satu pemindahan tidak akan dapat menjamin satu penyelesaian yang adil, pantas dan hemat tindakan tersebut (lihat perenggan 36–37).

(2) Bentuk pengisytiharan statutori yang diisi untuk memasukkan kaveat peribadi menunjukan, antara yang lain, alamat kediaman dan perniagaan defendan adalah di Ipoh, Perak. Kurang pemberatan diberikan kepada pengataan defendan yang dia kini tinggal di Terengganu. Dalam apa keadaan sekalipun, keadaan yang mana dia tinggal di Terengganu tidak membantu proses pemindahannya untuk tujuan pematuhan dengan faktor dalam sub-perenggan (B) A 57 k (1)(4) KKM. Ianya adalah tidak munasabah untuk mana-mana satu defendan boleh meminta prosiding dipindahkan dengan menjemput mahkamah untuk turut serta. Faktor dalam sub-perenggan (B) A 57 k (1)(4) KKM telah dipatuhi dan tindakan sepatutnya kekal di cawangan Mahkamah Tinggi ini. Pengataan defendan bahawa dalam keadaan perintah telah diberikan untuk

pengeluaran kaveat peribadi, saksi dari Kota Bahru, termasuk dirinya sendiri di Gua Musang, akan dipanggil untuk penaksiran ganti rugi, hanyalah satu pengataan kosong. Tiada bahan untuk menyokong hujahan tersebut dan ini tidak akan diambil kira. Ianya adalah pra-matang diperingkat ini dan masih belum ditentukan sama ada tindakan plaintif akan dibenarkan dan sama ada akan wujud apa-apa penaksiran ganti rugi, sekiranya ada, dan jika ada, oleh siapa, bila dan di mana (lihat perenggan 20, 38 & 40–42).

(3) Dalam keadaan kes, dan mengambil kira penerimaan lebih meluas teknologi komunikasi jarak jauh, ianya tidak dalam kepentingan keadilan untuk membenarkan permohonan pemindahan. Ianya tiada akan menjamin penyelesaian pantas dan hemat tindakan. Dengan perintah kawalan pergerakkan, yang menjadi perlu atas sebab pandemik COVID-19, kedudukan fizikal mana-mana satu litigan atau saksi dan isu untuk membuat perjalanan secara fizikal kepada mana-mana mahkamah telah menjadi kurang penting. Pendengaran dan mesyuarat kini boleh dilakukan melalui beberapa jenis platform internet (lihat perenggan 43–44 & 49).]

Cases referred to

Dalam Harta Pusaka Tasir Guntat, Yusoff Che Hat v Salbiah Khamis & Anor [2014] 1 LNS 1254, HC (refd)

Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor [2020] 5 MLJ 185, FC (refd)

Gasing Potensi Construction Sdn Bhd v Hyper Act Marketing Sdn Bhd [2019] MLJU 249; [2019] 1 LNS 407, HC (refd)

Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor [2016] 3 MLJ 553, FC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301, FC (refd)

KW Aquatic Supplies Sdn Bhd v Merp Technologies Sdn Bhd [2017] MLJU 1433; [2019] 2 CLJ 403, HC (refd)

Lim Guan Eng v FZ Sdn Bhd & Anor [2015] 8 MLJ 469, HC (refd)

Low Long Yoong & Anor v Low Kok Choon & Anor [2014] 2 MLJ 725, HC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (folld)

Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112, HC (refd)

Megarina Sdn Bhd v Enersafe Sdn Bhd [2002] 2 MLJ 180; [2002] 5 CLJ 478, HC (refd)

RHB Bank Bhd (previously known as United Malayan Banking Corp Bhd and then as Sime Bank Bhd) v Wong Kok Leong (as executor and trustee of the estate of Wong Kwong Wah, deceased) & Ors [2017] 4 MLJ 281, FC (refd)

Raja a/l Thangiah v Baldev Singh Bhar (Peguambela & Peguamcara mengambil

dalam gelaran syarikat Baldev Singh) [2001] MLJU 375; [2001] 7 CLJ 130, HC (refd)
SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors [2020] MLJU 400, HC (refd)
Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 23, 23(1), Schedule
Federal Constitution art 121(1)
National Land Code s 327, 329, Form 19B
Rules of Court 2012 O 41 r 1(4), O 57, O 57 r 1, 1(4), (4)(A), (4)(B), (4)(C), (4)(D), (4)(E)

CT Tenh (SK Tenh with him) (CK Lim, Tenh & Chong) for the plaintiff.
Manshan Singh a/l Jeswender Singh (Elizabeth Goh Yeek Li with him) (Skrine) for the defendant.

Su Tiang Joo JC:

[1] With the growing acceptance of remote communication technology, should the forum of the court be changed to keep pace with where the defendant has his place of residence or business?

NATURE OF ACTION

[2] The plaintiff filed this action on 21 February 2020 against the defendant for, inter alia, an order that private caveats lodged by the latter be removed pursuant to s 327 of the National Land Code ('the NLC'). The plaintiff claims amongst others that the entry of these private caveats was wrongful and seeks damages pursuant to s 329 of the NLC.

[3] The private caveats were lodged under Presentation Number 42 of 2020 dated 7 January 2020 ('private caveats') over the lands held under issued documents of title PN 10052, PN 10051, HS(D) 702 Mukim Relai and HS(D) 1644, HS(D) 3928, HS(D) 3927 and HS(D) 3926 Mukim Ulu Nenggiri, Jajahan Gua Musang, Negeri Kelantan ('the said lands').

THE TRANSFER APPLICATION

[4] On 11 March 2020, the defendant took out an application vide encl 5 pursuant to O 57 of the Rules of Court 2012 and or s 23 of the Courts of Judicature Act 1964 and or the inherent jurisdiction of the honourable court for an order that the action be transferred to the High Court in Malaya at Kota

Bahru ('the transfer application'). The plaintiff opposed the transfer application.

[5] In dealing with the transfer application, references were made to the originating summons, the three affidavits affirmed and filed on behalf of the plaintiff and three affidavits affirmed and filed by the defendant with exhibits in these affidavits running into more than 1,000 pages. The affidavit in reply affirmed by the defendant in encl 11 alone ran into 1,189 pages. Both the plaintiff and the defendant each filed two sets of written submissions citing a total of 26 authorities.

JURISDICTION OF THE HIGH COURT IN MALAYA AT IPOH

[6] Right at the outset, it was admitted by the defendant and rightly so, that this court has the jurisdiction over this action bearing in mind the provisions of art 121(1) of the Federal Constitution on the creation of only two High Courts; one, the High Court in Malaya and the other, the High Court in Sabah and Sarawak. As was said by Lim Beng Choon J in *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 at p 270 para B:

> It is implicit that a High Court located at Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of where the cause of action arose in another state.

GROUNDS FOR THE TRANSFER APPLICATION

[7] Order 57 of the Rules of Court 2012 ('O 57') relied upon by defendant in support of the transfer application provides that:

> 1 (1) Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate *is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction*, he may on application by any party, order the proceedings to be transferred to the other Court.
>
> 1 (4) further goes on to provide that:
>
> Before making any order to transfer any proceedings from:
>
> (a) the High Court to another High Court of co-ordinate jurisdiction;
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> *the High Court Judge or the Judge of the Sessions Court or Magistrate, as the case may be, shall take into consideration whether the High Court or the Subordinate Court which shall hear the case is located at or nearest the place where*:
>
> (A) *the cause of action arose;*

(B) *the defendant, or one of several defendants, resides or has his place of business;*

(C) *the facts on which the proceedings are based exist or are alleged to have occurred;*

(D) *the land the ownership of which is disputed is situated; or*

(E) *for other reasons it is desirable in the interests of justice that the proceedings should be transferred.* (Emphasis added by defendant.)

[8] Both the plaintiff and the defendant are on common ground that no one single factor will prevail over the other. For this principle, the defendant relies upon the authority of *Gasing Potensi Construction Sdn Bhd v Hyper Act Marketing Sdn Bhd* [2019] MLJU 249; [2019] 1 LNS 407 a decision of Mohd Radzi Harun JC (as His Lordship then was). The plaintiff on the other hand relied upon the case authority of *KW Aquatic Supplies Sdn Bhd v Merp Technologies Sdn Bhd* [2017] MLJU 1433; [2019] 2 CLJ 403, a decision of Ahmad Shahrir Mohd Salleh JC and that of *Megarina Sdn Bhd v Enersafe Sdn Bhd* [2002] 2 MLJ 180; [2002] 5 CLJ 478, a decision of Nik Hashim J (as His Lordship then was) for the proposition that where the law provides for several factors and uses the function word of 'or' to indicate an alternative, they must be construed disjunctively and therefore so long as the plaintiff can satisfy one of the factors the action can remain in the court in which the action was initiated.

[9] In *KW Aquatic Supplies Sdn Bhd v Merp Technologies Sdn Bhd* [2017] MLJU 1433 at para 34; [2019] 2 CLJ 403 p 414 para 34, Ahmad Shahrir Mohd Salleh JC went further to hold that:

> On the face of equally acceptable grounds for the transfer of proceedings … and for the proceedings to remain …, this court in the interest of justice, has to delve further into the facts and attempt to sieve determinant factors to assist in coming to a decision. In the case of *Low Long Yoong & Anor v Low Kok Choon & Anor* [2014] 2 MLJ 725; [2014] 4 CLJ 577 (HC), His Lordship Nantha Balan JC (then HCJ, at the time of Ahmad Shahrir Mohd Salleh JC's judgment and now JCA at the time of writing this judgment) was of the view that the most important task is to ascertain which court had the closest nexus in the dispute. In the circumstances of this case, I would readily subscribe to this view.

[10] In seeking to persuade this court that the transfer application ought to be allowed, the defendant asserts in the transfer application that:

(a) the said lands are situated in Kelantan;

(b) as the private caveats were entered at the Land and Mines Office in Kelantan, the cause of action arose in Kelantan;

(c) the proceedings in this action will have a bearing on the registered owner of the said lands namely the Perbadanan Menteri Besar of Kelantan; and

(d) while the defendant's residential address is listed in Ipoh, he currently resides in Kuala Terengganu where his business is based and where he spends most of his time.

ANALYSIS OF THE DEFENDANT'S SUBMISSIONS

[11] In analysing the grounds relied upon by the defendant, I am required by O 57 r 1(4) to take into consideration the factors set out in sub-paras (A) to (E) of this sub-rule which I have set out in para [7] above. From here on, references to sub-paras (A) to (E) shall mean references to sub-paras (A), (B), (C), (D) or (E) of O 57 r 1(4) as the case may be.

[12] From the grounds of the transfer application relied upon by the defendant and from the affidavits filed by the defendant, two factors contained in sub-paras (A) and (C) were said to be in the defendant's favour namely that because the private caveats had been entered in the Land and Mines Office in Kelantan the cause of action arose in Kelantan and closely related to this is that the act of lodgment of these private caveats in Kelantan would be part of the existence of facts on which the proceedings are based and are alleged to have occurred in Kelantan. Needless to say, the High Court at Kota Bahru is in the state of Kelantan.

[13] The defendant submitted that he currently resides in Kuala Terengganu in the state of Terengganu and by reason thereto the requirement for the factor in sub-para (B) is not met. More will be said on this later.

[14] That the defendant has no dispute over who owns the interest in the said lands meant that the factor in sub-para (D) was not relevant to the transfer application.

[15] The defendant submitted that the proceedings in this action will have a bearing on the registered owner of the said lands namely the Perbadanan Menteri Besar of Kelantan. However, the action herein is for the removal of private caveats over the said lands. With the Perbadanan Menteri Besar being not a party to this action, the latter will not be bound by any order made: *Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor* [2020] 5 MLJ 185.

[16] The defendant went on to submit that the transfer application was not a delaying tactic and although he had filed another suit against the plaintiff and two others in Ipoh High Court Originating Summons No AA-24NCC-3–02 of 2020, he did so because the Ipoh High Court was the *forum conveniens* for that matter. That such a submission is made, would suggest that the defendant was very much aware that in the event the transfer application were to be

allowed, the proceedings in this action will be delayed with its attendant increase in costs as the matter will take some time to be transferred to the High Court at Kota Bharu and for the matter to be rescheduled into the High Court's list at Kota Bharu. This does not augur well for the underlying need for the just, expeditious and economical disposal of the action.

[17] In considering the factors in sub-paras (A) and (C) on where the cause of action arose and the facts on which proceedings were based exist or were alleged to have occurred, the defendant helpfully referred to the case of *RHB Bank Bhd (previously known as United Malayan Banking Corp Bhd and then as Sime Bank Bhd) v Wong Kok Leong (as executor and trustee of the estate of Wong Kwong Wah, deceased) & Ors* [2017] 4 MLJ 281 where the Federal Court cited with approval the case of *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 which had reviewed a number of authorities and adopted with approval the definition of cause of action as:

(a) a factual situation the existence of which entitled one person to obtain from the court a remedy against another ...;

(b) the entire set of facts that gives rise to an enforceable claim, the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment ...; and

(c) that which makes the action possible ...

[18] It follows that just because the private caveats were entered at the Land and Mines Office in Kelantan it does not necessarily mean that the cause of action arose in Kelantan. As settled by the Federal Court in the case of *RHB Bank Bhd (previously known as United Malayan Banking Corp Bhd and then as Sime Bank Bhd) v Wong Kok Leong (as executor and trustee of the estate of Wong Kwong Wah, deceased) & Ors* the entire set of facts has to be taken into account and the entry of the caveats is but only one of the facts to be taken into account because it cannot be denied that an entry *simpliciter* does not *ipso facto* means it is unlawful: *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520.

[19] The grounds relied upon for the lodgment of the private caveats are also facts which make up the cause of action.

[20] A perusal of the forms and accompanying statutory declarations filed for the entry of the private caveats and exhibited in encl 2 show that the grounds were settled in *Kuala Lumpur* with the defendant declaring that his address is at No 2, Laluan Bercham Selatan 3/3, Taman Boulevard Timur, 31400 *Ipoh*, Perak claiming that he is entering the private caveats as a beneficiary shareholder of the plaintiff with its registered address at No 81, Tingkat 1, Jalan Market, *Ipoh*, 31400 Perak and a business address at No 27A

Jalan Perajurit Ipoh Garden East *Ipoh*, 31400 Perak. It is, therefore, arguable where the cause of action arose and where the facts on which the proceedings are based exist or alleged to have occurred but as will be seen later in this judgment, in my opinion, these factors in sub-paras (A) and (C) do not have a determinative effect on whether the transfer application ought to be allowed.

[21] Before I leave the analysis of the defendant's submissions, it would be fair to the defendant to mention that in both his written submissions, the defendant underscored the points that the cause of action did not arise in Ipoh but in Kelantan and he does not reside or have his place of business in Ipoh and although he concedes that there was never any dispute that this honourable court has jurisdiction over the action, it is not the *forum coveniens*. Reliance is placed by the defendant on the authority of *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 a decision of His Lordship Augustine Paul J (as he then was) for the principle that:

> the critical issue for determination is whether this court is the forum conveniens to hear the dispute notwithstanding the fact that it has jurisdiction to do so.

[22] It is appropriate to observe that in the case of *Malacca Securities Sdn Bhd*, His Lordship Augustine Paul J was then deciding on a transfer application premised not upon the provisions of O 57 r 1 but upon the provisions of s 23(1) of the Courts of Judicature Act 1964 ('the CJA') which are as follows:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose; or
>
> (b) the defendant or one of several defendants resides or has his place of business; or
>
> (c) the facts on which the proceedings are based exist or alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[23] The question then arises whether the added factor in sub-para (E) 'for other reasons it is desirable in the interest of justice' is ultra vires s 23(1)of the CJA and need not be considered. In my opinion, it is not because it cannot be gainsaid that the High Court was set up by the Federal Constitution to do justice and underlying its duty to do so, it should always have in the forefront of its mind, the interest of justice. In *Malacca Securities Sdn Bhd* itself at pp 119–120, Augustine Paul J said:

> The result is that a plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state ... (at p 119 second paragraph)
>
> In declining to exercise jurisdiction a court does so not on grounds of convenience but of the suitability or appropriateness of another tribunal in the interests of all parties and for the *ends of justice* ... (at p 119 last paragraph followed through to p 120 first paragraph) (Emphasis added.)

[24] Thus, what is set out in sub-para (E) of O 57 r 1(4) is only to express what is undeniably implicit in the court's duty to do take into account what is desirable to meet the interest or ends of justice.

FACTOR OF 'FOR OTHER REASONS IT IS DESIRABLE IN THE INTEREST OF JUSTICE' IN O 57 R 1

[25] The factor in sub-para (E) requires the judge to be satisfied that the proceedings in this court can be conveniently or fairly tried in some other court and one of the factors that has to be considered is whether it is desirable in the interests of justice to have the proceedings transferred to the other court.

[26] In my opinion, the added factor of 'for other reasons it is desirable in the interest of justice' was expressly set out in O 57 r 1(4) because the ROC 2012 has brought in a new regime in the disposal of cases whereby the progress of the case was no longer left in the hands of the litigants but with the court in the driver's seat: see *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301 Federal Court at para [18] as per Zulkifli CJ Malaya (as His Lordship then was). Although, this was decided in the context of an application to amend a defence, the underlying jurisprudence of the new regime for the need to secure the just, expeditious and economical disposal of the action is of general application. In the context of this transfer application under O 57 r 1, this underlying jurisprudence should be borne in mind.

[27] The defendant had very helpfully collated in his bundle of authorities in encl 27 several authorities on the construction and application of O 57 r 1. On these authorities in my opinion:

(a) the additional factor in sub-para (E) was not discussed and applied in the cases of *Gasing Potensi Construction Sdn Bhd v Hyper Act Marketing Sdn Bhd* [2019] MLJU 249; [2019] 1 LNS 407 and *Low Long Yoong & Anor v Low Kok Choon & Anor* [2014] 2 MLJ 725;

(b) the case of *Raja a/l Thangiah v Baldev Singh Bhar (Peguambela & Peguamcara mengambil dalam gelaran syarikat Baldev Singh)* [2001] MLJU 375; [2001] 7 CLJ 130 (HC) was decided before the introduction of O 57 r 1; and

(c) the Federal Court authority of *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553 in dealing with the power to transfer any proceeding to any other court held that para 12 of the Schedule to the CJA has to be read in the light of s 3 of the CJA and O 57 r 1 and the FC went on to hold that the High Court in Malaya does not have the jurisdiction to transfer any proceeding in the High Court in Malaya to the High Court in Sabah and Sarawak because local jurisdiction is defined to mean the territory comprised in the states of Malaya and a transfer of proceedings in the context of O 57 r 1(4) of the ROC can only mean the power to transfer within the territorial jurisdiction of either the High Court in Malaya or High Court in Sabah and Sarawak.

[28] None of the cases referred to above by the defendant dealt with the factor in sub-para (E) of 'for other reasons it is desirable in the interest of justice' which gives the court the discretion to take into account other reasons in the interest of justice which the court strives to serve. Whether it would be in the interest of justice to allow the transfer would be dependent upon the facts of each case.

[29] The defendant cited two other cases where the transfer applications were allowed: *Dalam Harta Pusaka Tasir Guntat, Yusoff Che Hat v Salbiah Khamis & Anor* [2014] 1 LNS 1254 and *Lim Guan Eng v FZ Sdn Bhd & Anor* [2015] 8 MLJ 469. The first case was an administration of estate case and the other a defamation case, both of which have to be tried with witnesses and where in the former, the mobility of one of the witnesses in attending court weighed heavily in the mind of the learned judge. As will be seen later, the importance of the mobility of witnesses attending court is now of much less importance. However, it is to be observed that in *Dalam Harta Pusaka Tasir Guntat, Yusoff Che Hat*, Wong Teck Meng JC (as His Lordship then was) at para 46 of his judgment in dealing with the transfer application made pursuant to O 57 r 1(4) grounded his decision on the 'in the interest of justice' provision and eloquently said the court is the '... protector of justice ...' .

APPLICATION OF SUB-PARA (E) — 'FOR OTHER REASONS IT IS DESIRABLE IN THE INTEREST OF JUSTICE'

[30] I now turn to consider the facts and in particular the underlying premise of this action.

[31] The action is for the removal of the private caveats lodged by the defendant over the said lands.

[32] It is not disputed by the parties that the plaintiff has an interest in the said lands in the form of a lease of the said lands for 66 years.

[33] Both the learned counsel for the plaintiff and the defendant agreed when asked during the hearing of the transfer application on 3 September 2020 that the critical issue in the main action is whether the defendant who lodged the private caveats has any registrable interest in or a right to claim title to the said lands.

[34] Without deciding on the merits of the action, my view is that this critical issue is a question of law which can be tried without the necessity of calling witnesses as the facts of lodgment of the private caveats, why and where they were lodged have been set out in the affidavits filed in this action and are undisputed. It only remains to be decided whether as a matter of law, the lodgments were lawful.

[35] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520, the Court of Appeal said that:

> *In considering an application for the removal of a caveat, the procedure to be adopted should be a simple and summary one* with the first stage being to examine the grounds expressed in the application for the caveat and once the court is satisfied that the caveator's claim amounts *in law* to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies. (Emphasis added.)

[36] Based upon the authority of *Luggage Distributors (M) Sdn Bhd*, the factors of where the cause of action arose and where the facts on which the proceedings are based exist or are alleged to have occurred would not be determinative of the transfer application by reason of the procedure that is to be adopted for the purposes of the hearing of this action. Pursuant to this procedure, the action can just as conveniently and fairly be tried in this court.

[37] More importantly, with the proceedings in this action having reached an advanced stage of being ready for hearing it would not be in the interest of justice to have the action transferred to another court as a transfer would not secure the just, expeditious and economical disposal of the action.

[38] In the prescribed forms for the lodgment of the private caveats viz, Form 19B and the statutory declarations affirmed by the defendant accompanying the prescribed forms which were exhibited in the affidavit in support of the main action (encl 2) and also referred to by the defendant in his transfer application, the defendant had affirmed that his address is at No 2, Laluan Bercham Selatan 3/3, Taman Boulevard Timur, 31400 *Ipoh*, Perak. This amply

supports the plaintiff's submission that the factor in sub-para (B) has been complied with and the action should remain in this branch of the High Court in Malaya.

[39] On top of that, a perusal of the affidavits filed by the defendant in support of the transfer application in encls 6 and 20 show that he had affirmed that his place of residence is that of No 2, Laluan Bercham Selatan 3/3, Taman Boulevard Timur, 31400 *Ipoh*, Perak. Order 41 r 1(4) of the ROC mandates that every affidavit shall, inter alia, state the place of residence of the deponent. Having affirmed statutory declarations and affidavits that he resides in *Ipoh*, it does not lie in the mouth of the defendant to say otherwise.

[40] It follows that for purposes of this transfer application, this court should give little weight to the defendant's averment that he currently resides in Kuala Terengganu. In any event, his residing in Kuala Terengganu does not in any way aid his transfer application to have the action transferred to the High Court in Malaya at Kota Bahru for purposes of compliance with the factor in sub-para (B). It would be absurd if any one defendant can seek a transfer of proceedings just by relocating to another local jurisdiction in the course of proceedings and inviting the court to play catch up.

[41] The defendant also submitted during oral submissions on 3 September 2020 that in the event an order is granted for the private caveats to be removed, witnesses from all over including witnesses from Kota Bharu including the defendant who is now in Gua Musang will have to be called for the assessment of damages.

[42] However, with all due respect to the defendant, this is a bare averment or more commonly known as making a submission from the Bar without any supporting materials to support the same and the court will not take it into consideration. It is also premature at this stage as it is yet to be determined whether the plaintiff's action would be allowed and whether there would be any assessment of damages, if at all, and if so by who, when and where.

[43] In any event, with the experience gained in using remote communication technology in dealing with the Movement Control Order, Conditional Movement Control Order and the Recovery Movement Control Order that is extant and which were necessitated by the COVID-19 pandemic, the physical location of any one litigant or witness and the issue of having to physically travel to any court has become very much less important (*http://www.kehakiman.gov.my/sites/default/files/2020-04/Press%20Release%2017%20April%202020.pdf*).

[44] The need for counsel, litigants and witnesses to physically travel to the court for the hearing of their matters is getting less and less. Hearings and meetings can now be done and are, by reason of the COVID-19 pandemic, encouraged to be done electronically via a variety of internet platforms (*http://www.kehakiman.gov.my/sites/default/files/Kenyataan%20Media%20PKPMP%2012%20Jun%202020%20-%20Perbicaraan%20Kes%20Secara%20Sidang%20Video%20Bagi%20Mahkamah20Persekutuan%20dan%20Mahkamah%20Rayuan%20di%20Sabah%20dan%20Sarawak.pdf*) such as 'Zoom' or 'Skype' not to mention that there are other platforms as well such as 'Google Duo', 'Google Hangouts', 'MS Teams' and 'Adobe Connect' (*http://www.kehakiman.gov.my/sites/default/files/2020-03/KENYATAAN%20MEDIA%20PKPMP%2026.3.2020%20-%20PEMAKLUMAN%20PENDENGARAN%20KES%20SECARA%20DALAM%20TALIAN%20SEMASA%20TEMPOH%20PERINTAH%20KAWALAN%20PERGERAKAN.pdf*).

[45] In fact, with the aid of video conferencing and given the restrictions in air travel caused by the COVID-19 pandemic, you can, for example, have a court sitting in the British Virgin Islands ('BVI') conducting a trial with participation by counsel from the United Kingdom, solicitors from Singapore and Hong Kong and witnesses from Hong Kong, Australia and Malaysia all from the comfort of their respective offices or homes without having to fly out to the court in the BVI (*https://maples.com/en/Knowledge-Centre/Analysis-and-Insights/2020/07/Maples-Group-Acts-in-BVI-Commercial-Courts-First-Remote-Trial*). If this can be done across countries, what more is to be said about the importance and necessity, if any, of litigants and witnesses residing in Malaysia having to be physically present in a particular branch of the High Court in Malaya.

[46] The Malaysian courts have kept up with the march of technology. Case management of cases by way of e-reviews (*https://intranet.kehakiman.gov.my/EAA/arahanamalan/73491–2020–EAA.pdf*) is widely used and paperless hearings with the aid of technology in the Federal Court has commenced this year (*http://www.kehakiman.gov.my/sites/default/files/Kenyataan%20Media%20PKPMP%205.6.2020%20-%20Persidangan%20Kes%20Mahkamah%20Persekutuan%20Malaysia%20Menggunakan%20Sistem%20e-Appellate%20pada%209%20Jun%202020_0.pdf*).

[47] The first virtual hearing with the parties being not physically present in court was conducted by the Court of Appeal via tele-conferencing on 23 April 2020 and live-streamed to the public with the three learned judges comprising the panel of the Court of Appeal hearing the matter seated separately in each of their chambers/homes and the learned counsel for the parties seated in their own respective office/home (*http://www.kehakiman.gov.my/sites/default/files/2020-04/Press%20Release%20-%20Tayangan%20Langsung%20%28Live%2*

0Streaming%29%20Pendengaran%20Kes%20Secara%20Dalam%20Talian%20%28 Online%20Hearing %29.docx.pdf).

[48] Recently, in *SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors* [2020] MLJU 400, Wong Kian Kheong J conducted three applications through 'Skype' and decided that even if the plaintiff had objected to the use of video conferencing ('VC'), in view of the fundamental right of the defendants:

> to have access to justice as guaranteed under art 5(1) of the FC, the court would nevertheless exercise its discretion to proceed with the VC in the interest of justice under O 32 rr 10 and 11(1) read with O 1A and O 2 r 1(2) of the RC.

CONCLUSION

[49] In my view, in the circumstances of this case and given the increasing acceptance of remote communication technology, it would not be in the interest of justice to allow the transfer application. It would not secure the just, expeditious and economical disposal of the action. Accordingly, I had after hearing counsel for the plaintiff and defendant on 3 September 2020, dismissed the transfer application in encl 5 with costs of RM20,000 subject to the payment of allocator bearing in mind the application was heard pursuant to a Certificate of Urgency, the seniority of counsel involved and the amount of materials, submissions and authorities that have to be considered.

[50] I end by thanking counsel for both the plaintiff and the defendant for the submissions they have made which made it easier for me to put up this judgment and I mean no discourtesy to counsel, if I did not make mention of any of the other authorities they have cited as it was not necessary to do so for the reasons I have expressed in coming to the decision I have made.

Defendant's application in encl 5 dismissed with costs of RM20,000 subject to payment of allocator.

Reported by Mohd Kamarul Anwar